Nos. 12217 and 12221.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL HARRY KASINOWITZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

and Consolidated Cases.

LILLIAN ADELE DORAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

and Consolidated Cases.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Jurisdictional Statement.

These are appeals, consolidated by Order of this Court, upon stipulation of the parties, from:

(1) Judgments and *sentences* of the United States District Court, for the Southern District of California, Central Division, as to appellants Kasinowitz, Steinberg, and Dobbs, No. 12217 and

(2) *Orders* of the United States District Court, for the Southern District of California, Central Division, as to appellants Doran, Bock, Caress, Blair, Brodsky and Spector, No. 12221.

In case No. 12217 there was entered as to each appellant a criminal "Judgment and Commitment" [R. 31-35].[1]

In case No. 12221 there was entered in the District Court as to each appellant a "Judgment, Order and Commitment in Civil Contempt" [R. 66-117].

The District Court had jurisdiction of the proceedings as to all appellants under (new) Title 18 United States Code, Section 401.

This Court has jurisdiction of these appeals under (new) Title 28 United States Code, Section 1291 and Section 1294(1).

The Questions Involved.

(1) Whether answers to any of the questions propounded calling for "yes" or "no" answers as to their knowledge of another person would tend to incriminate the appellants for an offense against the United States Government?

(2) Whether answers to the question calling for their knowledge of the occupation of another would tend to incriminate the appellants for an offense against the United States Government?

(3) Whether the answer to the question for whom was he an organizer, put to the appellant Brodsky, would tend to incriminate him for an offense against the United States Government.

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[1]References preceded by the letter R. are to the printed Record on appeal.

Statement of the Case.

Each of the appellants appeared individually before the United States Grand Jury sitting at Los Angeles, California, and was asked certain questions which each refused to answer on the ground that the answer might tend to incriminate him.

The appellants Caress, Brodsky and Blair appeared before the Grand Jury after apprehension by a United States Marshal upon a bench warrant issued out of the District Court [R. 44, Caress; R. 52, Blair; R. 61, Brodsky], pursuant to motion of the United States Attorney, based upon the ground that each of said appellants was deliberately avoiding service of subpoena [R. 32, Caress; R. 45, Blair; R. 53, Brodsky].

At various times between October 27, 1948, and January 12, 1949, the appellants Doran, Bock, Spector, Kasinowitz, Steinberg, and Dobbs, appeared before the Grand Jury, pursuant to subpoena, after the District Court had denied a motion brought in behalf of appellants Bock [R. 62] and Spector [R. 268, 269] to quash the subpoena. In the motion to quash as to appellant Bock the moving parties were Frank Edward Alexander, Ben Dobbs, Samuel Harry Kasinowitz and Henry Steinberg [R. 62], who were appellants in Case No. 12081, and as to each of them the motion referred to the original subpoenas served upon them in that case and not to the subpoenas pursuant to which each appeared in the present case.

In regard to the subpoenas pursuant to which the appellants Doran, Kasinowitz, Steinberg and Dobbs appeared

in this case, and subsequently upon interrogation refused to answer questions with which these appeals are concerned, no motion to quash was made.

Upon their appearance before the Grand Jury each of the appellants was advised by the United States Attorney, or by the Special Assistant to the Attorney General that the Grand Jury investigation was not directed toward him, and each was further advised that the Grand Jury was investigating employees of the Federal Government who had made false statements to a Government agency [R. 349, 352, Doran; R. 384, Bock; R. 545-546, Caress; R. 548-549, Blair; R. 532, Brodsky; R. 541, Spector; R. 431, Kasinowitz; R. 438, Steinberg; R. 403, Dobbs].

Each of the appellants with the exception of Blair was asked before the Grand Jury if he was a Federal employee; each stated that he was not and never had been a Federal employee[2] [R. 353, Doran; R. 385, Bock; R. 546, Caress; R. 532, Brodsky; R. 541, Spector; R. 431, 433 Kasinowitz; R. 439, Steinberg; R. 404, Dobbs].

The appellants Doran, Bock, Dobbs, Kasinowitz and Steinberg further stated before the Grand Jury that they were not personally acquainted with any employees of the Federal Government [R. 353, Doran; R. 387, Bock; R. 431, 433, Kasinowitz; R. 439, Steinberg, and R. 404, Dobbs].

Other references in the record as to the nature and purpose of the Grand Jury inquiry are as follows:

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[2]Brodsky answered that he had not been a Federal employee in the last year; Spector answered that he had not been within the last two or three years.

1. Grand Jury Presentment of appellants Kasinowitz [R. 2]; Steinberg [R. 5] and Dobbs [R. 8].

> "* * * the Grand Jury for the United States of America duly empanelled and sworn, in the District Court of the United States for the Southern District of California, Central Division, at the September 1948 Term, *undertook an inquiry concerning certain employees of the United States Government, who had made false statements to an agency of the Government, in a matter within the jurisdiction of that agency and in connection with the investigation of their loyalty to the Government, in violation of old Section 80, Title 18, U. S. Code, Revised Title 18, U. S. Code, Section 1001 and other criminal laws of the United States.*" (Emphasis added.)

2. Affidavit of James M. Carter [R. 13].

> "That affiant (James M. Carter) and Max H. Goldschein, Special Assistant to the Attorney General, instituted said Grand Jury proceedings because there was referred to them *certain violations of the law concerning individuals, none of whom were the witnesses called before the grand jury, which indicated there had been a violation of Title 18, U. S. C., Sec. 80, or Revised Title 18, U. S. C., Sec. 1001, namely the making of a false statement to a Government Agency;* that said grand jury proceeding and the interrogation of the various witnesses called before the grand jury, were part of an investigation into the alleged violation of said statutes." (Emphasis added.)

3. Identical allegations, except for name of affiant and name of his associate were made in the Affidavit of Max H. Goldschein [R. 15-16].

4. Caption of Motions for Issuance of Bench Warrant [R. 37, 45, 53].

> "In the Matter of the *Investigation by the Grand Jury Concerning Loyalty of Government Employees* entitled 'Miscellaneous Investigation No. 279, 18 U. S. Code 1001, 18 U. S. Code 80 (old section)." (Emphasis added.)

5. Affidavits of James M. Carter [R. 39, 47-48, 55].

> "That an investigation is now being conducted by the Grand Jury of this District *concerning the loyalty of Government employees and concerning persons who are alleged to have violated provisions of Revised Title 18, United States Code, Section 1001, and Old Title 18, United States Code, Section 80, which sections define the crime of making a false statement to a Government agency concerning a matter within its jurisdiction.*" (Emphasis added.)

6. The trial court's statement that this was a Grand Jury inquiry of Federal Government employees who had made a false statement in violation of Title 18, Section 1001 [R. 565].

7. Testimony of Roland B. Ahlswede, foreman of the Grand Jury, called as a witness by appellants Dobbs, Kasinowitz and Steinberg, that the witnesses were called in connection with an investigation of false statements made by four Government employees [R. 253].

8. Testimony of James M. Carter, United States Attorney, called as a witness by appellants Dobbs, Kasinowitz and Steinberg that the witnesses were subpoenaed in connection with a Grand Jury investigation of false statements by Government employees [R. 265].

The appellants were asked, refused to answer and thereafter each was ordered by the Court to answer certain of

the following questions, as indicated below, which they refused to do and for which they were found in contempt and committed:

1. "Do you know the names of the officials of the Los Angeles County Communist Party?"
2. "Do you know the table of organization of the Communist Party of Los Angeles County?"
3. "Do you know Dorothy Healey?"
4. "Do you know her business or home address?"
5. "Do you know her occupation?"
6. "Do you know where she can be found or located?"
7. "Do you know whether or not she is married?"
8. "Do you know her husband's name?"
9. "Do you know his occupation?"
10. "What is his occupation?"
11. "Do you know who or what officer of the Communist Party of Los Angeles County is in charge of membership or membership rolls?"
12. "Do you know any person in the County of Los Angeles who advocates the overthrow of the Government of the United States by force and violence?"
13. "Do you know any organization in the County of Los Angeles that has for its purpose the overthrow of the Government of the United States by force and violence?"
14. "Who are you an organizer for?"
15. "Have you seen Dorothy Healey recently?"
16. "Do you know Ned Sparks?"
17. "Do you know Elizabeth Glenn?"
18. "Do you know Mrs. Houdek?"

(The questions vary slightly in immaterial respects from witness to witness as appears to be conceded by all parties).

The numbers opposite the names below indicate the above-numbered questions which the respective witnesses refused to answer after being ordered by the Court to do so:

Doran: 16, 3, 4, 5, 6, 7, 8, 9, 10 [Presentment R. 462-463; Judgment R. 71].

Bock: 3, 4, 5, 7, 8, 9, 10 [Presentment R. 464-466; Judgment R. 79].

Caress: 2, 3, 4, 6, 8, 9, 11, 12, 13 [Presentment R. 452-453; Judgment R. 86-87].

Blair: 1, 2, 3, 4, 5, 6, 8, 9, 11, 12, 13, 15, 17, 18 [Presentment R. 457-459; Judgment R. 96-97].

Brodsky: 2, 3, 4, 5, 6, 8, 9, 11, 12, 13, 14 [Presentment R. 455-456; Judgment R. 106-107].

Spector: 2, 3, 5, 6, 7, 8, 9 [Presentment R. 450-451; Judgment R. 114].

Kasinowitz: 3, 4, 5, 6, 7, 8, 9 [Presentment R. 2].

Steinberg: 3, 4, 5, 7, 8, 9 [Presentment R. 5].

Dobbs: 3, 4, 5, 7, 8, 9 [Presentment R. 8].

Upon the refusal of the several appellants before the Grand Jury to answer the questions above, in each instance there was a hearing in open court to determine whether the privilege of self-incrimination justified the refusal to answer and each appellant was thereafter ordered by the Court to answer the questions indicated above [Doran, R. 383-384; Bock, R. 401; Caress, R. 601-602; Blair, R. 604-605; Brodsky, R. 603-604; Spector, R. 600-601; Kasinowitz, R. 436; Steinberg, R. 443; Dobbs, R. 429-430].

In addition to the hearing in open Court, the witnesses listed below were given an opportunity to tell the Court

privately in chambers, in the absence of counsel, under a sealed transcript, how the answer would tend to incriminate them. While they availed themselves of this opportunity they told the Court nothing that added to what had been adduced in open Court. The sealed transcript was subsequently ordered opened by the witnesses [Doran, R. 380-383; Bock, R. 396-400; Kasinowitz, R. 435-436; Steinberg, R. 441-442; Dobbs, R. 427-429].

Upon being ordered by the Court to answer, each of the appellants was returned to the Grand Jury room where each persisted in his refusal to answer the questions ordered on the ground that the answers would incriminate him.

A presentment to the Court as to each witness thereafter followed upon which there was evidence received in open Court of the refusal of each to answer the questions indicated above, witnesses were called by the appellants and evidence offered in their behalf, at the conclusion of which, and after argument by each side, the Court found the appellants Doran, Bock, Caress, Blair, Brodsky and Spector guilty of civil contempt [R. 506] and the appellants Kasinowitz, Steinberg and Dobbs guilty of criminal contempt [R. 325].

Pursuant to order of this Court, upon stipulation of the parties, the brief filed by the Government in the case of *Alexander et al. v. The United States of America,* No. 12081, is adopted by the Government in support of its position herein and this brief will be confined to a presentation of the factual materials in the record of these cases and an application of the authorities cited in the *Alexander* case brief together with certain new or additional authorities.

ARGUMENT.

I.

The Appellants' Claim of Privilege Is Spurious.

The appellant witnesses in these cases have advanced no argument or authority different from what was offered by the appellants in the *Alexander* case, No. 12081. They contend here as the witnesses did there that the asking of the questions occurred in a particular setting, described by them but unsupported by the record, which somehow transforms these appellants from ordinary witnesses into the role of privileged characters, privileged that is in a manner not available to ordinary citizens or witnesses but only to those who entertain "minority beliefs," which somehow grant them an immunity from the ordinary duties of citizenship.

The appellants here are apparently persisting in the type of argument first advanced by the appellant witnesses in the *Alexander* case, that the interrogation before the Grand Jury of these witnesses "is entirely a political maneuver on the part of the Democratic administration, instituted particularly at this time, with relation to the election for the purpose of attempting to influence the election, not for the purpose of obtaining any information concerning any alleged crime" [Alexander, R. 52, 53]. The proceedings with which the cases at bar are concerned took place after election day.

The appellants contend that they have been subjected to a "grand inquisition against political activities."[3] *There*

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[3]Brief for appellants, p. 60.

was no inquiry into the political activities of these witnesses. The record demonstrates that the Government had and has no interest in the political activities of these witnesses. The questions asked indicate no interest in the activities or views of these witnesses. The questions asked plainly show that the Government was interested in ascertaining the facts concerning the crime of making a false statement to the Government by a Government employee, which could be committed only by persons other than the witnesses, as each witness was advised before being question before the Grand Jury.

A. The Appellants' Showing Was Immaterial.

The so-called "appellants' showing" is entirely immaterial in law and logic in determining whether the privilege against self-incrimination applies. Their "showing" consists of offers to prove:

> (a) That the reason for questioning appellants was to ascertain from them, or others, the whereabouts of the records of the Communist Party (of Los Angeles County).
>
> (b) That Dorothy Healey was generally reputed to be Secretary of the Los Angeles Communist Party.
>
> (c) That this Grand Jury was conducting a drive against the Communist Party under the Smith Act.
>
> (d) That the official position of the Department of Justice was that the Communist Party is an organization in violation of the Smith Act and that a nation-wide prosecution of the Communist Party had begun.

All of the above the appellants offered to prove by hearsay evidence [R. 302, 304, 305, 307, 335, 337, 338, 339, 371-380, 592-593].

In other words, the appellants contend that newspaper articles and columnists' stories, appearing in New York, Los Angeles and Rocky Mountain newspapers, and published reports of a California legislative committee, (although the rankest hearsay evidence as to the truth of any fact therein contained) establish that the Grand Jury proceedings are directed against these appellants. They contend that a privilege against self-incrimination therefore attaches justifying their refusal to give testimony concerning the commission of crime by others.

It is the erroneous contention of the appellants that these news articles, columnists' comments and legislative committee reports spell out a crime *and describe these appellants* as probable participants therein. What other purpose was there for offering this evidence?

Suppose the Attorney General does intend to prosecute all those who advocate the overthrow of the Government by force and violence in every part of the country and wherever the facts warrant. Suppose the Attorney General did direct that the evidence concerning the twelve Communists in New York be presented to the Grand Jury. How are the appellants in this case shown by the record in this case to be connected in any way with the intentions or declarations of the Attorney General?

B. Even if Material and All Evidence Offered Is Deemed Admitted the Privilege Against Self-Incrimination Is Not Established.

For the purpose of argument, if we deem that all evidence offered by the appellants was received it could at most, even if material, tend to show that the purpose of this Grand Jury inquiry was something different than the inquiry into false statements by Government employees. Yet the record is replete with evidence which conclusively establishes that the purpose of the Grand Jury inquiry was the investigation of Government employees who had made false statements to a Government agency. The only witnesses to testify on this subject were the United States Attorney James M. Carter, and Roland B. Ahlswede, the Foreman of the Grand Jury. *They were both called by the appellants* and their testimony on the matter was clear and definite.

C. The Appellants' Assertion of the Privilege Is an Attempt to Play the Role of Martyr and to Create the False Impression of Being Persecuted in Order to Delay the Grand Jury Investigation.

The appellants apparently contend that they are "those whose dissidence of opinion and paucity of members make them helpless victims of official demands for conformity as well as of prejudice or public excitement" (Brief for Appellants pp. 60-61). If theirs is a dissidence of opinion only they know what that opinion is or that it deserves the designation of "dissidence." The record does not show that the Grand Jury was interested in what their opinions

are, or even that they have any. This case is not concerned with opinions entertained by any person, they are not involved, the record does not disclose any and indeed there is not even a bare reference in the record to the opinion of any one.

If there is any "official demand for conformity" involved in this case the Government is without knowledge of it. The record is barren of any such reference. The Government has made no demand for conformity, except for conformity to the elementary requirement that the orders and processes of the Court be obeyed.

If these appellants are the "victims of prejudice or public excitement" the basis of their claim is entirely obscure. The record does not disclose them as victims and nowhere does "prejudice or public excitement" appear. The degree of their own private excitement is manifest from the mere making of such a statement as also is it in their statement, "Appellants feel it necessary to express to this Court a sense of shock that the Court below was so indifferent to the possibility that it was being misused." (Brief for Appellants p. 60.)

In all the matters referred to above the appellants have made a specious attempt to assume the protective cloak of the privilege upon the basis of their own imaginative creation unsupported by competent evidence and unconnected with them. We proceed now to consideration of the law upon the facts actually disclosed by the record.

II.

Clearly No Self-Incrimination Can Arise DIRECTLY From Answers to the Questions Propounded.

The sixteen questions beginning "Do you know * * *? call for a "yes" or "no" answer. They do not call for an answer setting forth the basis for the "yes" answer if such be given. Merely to admit knowing the name, occupation, address or whereabouts of any person regardless of what the person's affiliations may be cannot possibly be incriminatory.

The appellants apparently concede that the questions do not call for incriminatory answers, except to the extent that their offers of proof show the existence of alleged criminatory circumstances. For they state in their brief:

> "Concededly the questions propounded to appellants do not on their face disclose the possible incriminatory nature of the answers." (Brief for Appellants p. 13.)

How then have these appellants shown that *they* are in a position of danger by answering? Does any offer of proof made by them if proved show *them* to be in danger?

Does the indictment in New York of twelve members of the Communist Party of the United States on the charge generally of advocating the overthrow of the Government by force and violence show *these appellants* to be in danger?

Does the administrative determination by the Attorney General[4] that the Communist Party is a subversive organization show any connection with *them* or show a danger to *them.*

Does the existence of an intention on the part of the Attorney General or of the United States Attorney to prosecute violators of the Smith Act show any connection with *these appellants* or show a danger *to them?*

The answer to each of these questions is clearly *no.* These witnesses are no more shown to be in danger than John Doe, or any person picked at random from any place. Indeed, if these witnesses are deemed to have made a showing of danger *to them,* then any witness chosen at random without regard to who he might be or what he might know, if asked these questions, could contend likewise that he was in danger and thus, on appellants' theory any witness could claim the privilege and refuse to testify.

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[4]Fed. Reg., Vol. 13, No. 56, p. 1471.

III.

There Has Been No Showing That Self-Incrimination Will Result INDIRECTLY From Answers to the Questions Propounded.

To raise the privilege the *indirect* effect of answering the question must: have a *tangible* and *substantial probability* that the answer of the witness may help to *convict him of a crime, Ex parte Irvine,* 74 Fed. 954, 960; the danger must be *real* and *appreciable, Mason v. United States,* 244 U. S. 362, 366; any fact disclosed must be a *necessary* and *essential* part of a crime, *United States v. Burr, In re Willie,* 25 Fed. Cases No. 14, 692 e; the witness must, by answering, be placed in *pressing danger, United States v. Weisman,* 111 F. 2d 260.

The cases cited and relied upon by the appellants are clearly distinguishable and not in point:

A. *United States v. Zwillman,* 2 Cir., 108 F. 2d 802.

In this case the witness' showing included a statement in his behalf, in open Court by his attorney, that he had been in the liquor business up to 1933, when the 18th Amendment to the Constitution was repealed, at a time when such business activity obviously was a violation of Federal law. The Grand Jury inquiry was under 18 U. S. C. A., Sec. 88, which denounced conspiracies to commit any offense against the United States or to defraud the United States in any manner or for any purpose. The questions asked were as follows:

1. "Who were your business associates in 1928?"

2. Same questions as to 1929, 1930, 1931, and 1932.

Obviously in such a case, where the witness discloses an actual participation in a criminal business activity, as was

done in the *Zwillman* case, where the questions asked consist of an inquiry into business activities and where the Grand Jury inquiry was concerned with the very type of Federal crime involving such activities the witness has shown himself to be in peril. This case points up very distinctly the extent to which these appellants have failed to make a showing that *they* were in peril.

B. *United States v. Weisman,* 2 Cir., 111 F. 2d 260.

In this case the Grand Jury inquiry concerned the importation of narcotics from Shanghai, the witness had already answered some questions in connection therewith on several appearances before the Grand Jury, the prosecutor had announced that he would soon indict as a dealer in narcotics "the owner of a big advertising agency" who had been the "active partner of a big gangster" and who had been "in hiding for a month." The witness was in fact the head of an advertising agency, it had been rumored he had been the accomplice of a "gangster" and in fact he had gone to Florida under circumstances which suggested that he was trying to hide; the prosecution had questioned the witness' family about his business activities and had secured the books of his business. The questions asked were in substance:

1 Whether the witness had received any cables at Murray's Restaurant (copies of cables to this address, in code, from Shanghai being in possession of the prosecution);

2. Whether he knew anyone who visited, lived in, or stayed at Shanghai in the years 1934 to 1939?

Comment would appear to be unnecessary to point out the difference in peril to the witness Weisman, who was so closely described without being named, and to the ap-

pellants in the case at bar, who argue that they are in peril, but do not show it in the record. The cases are entirely distinguishable on this basis.

C. *United States v. Cusson,* 2 Cir., 132 F. 2d 413.

In this case the witness showed that two men named Groves were under indictment in the Southern District of New York, that they were both tried upon the indictment and that before the trial began the witness went to Mexico, stayed there while the trial was on and came back shortly after its conclusion. The witness had been asked by the prosecutor immediately before she appeared before the Grand Jury whether she had been subpoenaed to attend the trial. The question which was asked and the witness refused to answer was whether she had met any of the Groveses upon a visit to Philadelphia in February 1941, *shortly before the trial began.* She refused to answer on the ground that it might serve as a link in establishing that the Groveses had told her to go to Mexico so as to avoid being called as a witness and that this would tend to prove that she had conspired to obstruct justice.

In the *Cusson* case upon the showing made by the witness, all that was lacking to complete the necessary elements of the crime of conspiracy to obstruct justice was the very link which she declined to furnish, viz., that the Groveses had requested her to leave.

Again it appears obvious beyond any necessity of comment that the degree of peril to Cusson, based upon the showing made by her, was greater than anything shown by the appellants and particularly it was shown to be a peril to *her*, because it was indicated that the Grand Jury inquiry was being made of her. In the case at bar the Grand Jury inquiry was *not* concerned with appellants as each was advised.

D. *Counselman v. Hitchcock,* 142 U. S. 547.

In this case Counselman appeared before the Grand Jury and after having answered questions in which he identified himself as a dealer in interstate shipments of grain he was asked certain questions of which the following are in substance representative:

> Q. Have you received for the transportation of your grain a rate less than the tariff or open rate?
>
> Q. Have you received any rebate from the railroads on the transportation of grain whereby you received or secured transportation at less than tariff rates?

The Interstate Commerce Act, 24 Stat. 382, as amended by 25 Stat. 857, according to the provisions thereof in effect at that time made it a crime for any shipper to contract for or receive a rate less than the tariff or open rate.

It is obvious, therefore, that answers to the questions asked of Counselman would *directly* incriminate him, or as was stated by the Court in that case, at page 562:

> "If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act."

It cannot be contended that any *direct* tendency to incriminate could result to the appellants from answers to the questions in the case at bar, and, indeed, as we have noted above, the appellants themselves do not contend that any danger of direct incrimination exists (see Brief of Appellants p. 13). The *Counselman* case in its holding is, therefore, clearly distinguishable from the case at bar. For further discussion on this case see Government's Brief in the *Alexander* case.

E. *United States v. Rosen,* 2 Cir., Case No. 209, October Term 1948, Decided April 25, 1949.

In this case the witness Rosen was asked several questions pertaining to his ownership of a certain Ford automobile, *a certificate of title of which was shown to him bearing his purported signature, signed before a notary.* The witness refused to answer the questions upon the ground of self-incrimination, was thereafter ordered to answer and refused.

The evidence upon Rosen's trial for contempt showed that the Ford automobile had allegedly been transferred at or about the date appearing on the certificate of title on which his signature appeared and that the transfer was made in connection with certain alleged illegal activities in espionage of one Alger Hiss. The Court of Appeals reversed the order adjudging the witness in contempt on the following grounds:

> 1. "He (Rosen) knew that the disposition by Hiss of this Ford car which he had used while engaged in such unlawful activities *had become a matter material to the investigation being conducted by the grand jury.*" (P. 1239.)
>
> 2. "He (Rosen) knew, therefore, that there were peculiar and unusual circumstances regarding his purported connection with the car *and that the grand jury was seeking evidence to show just what they were and what they signified.*" (Pp. 1239-1240.)

The showing made by Rosen, therefore, was that *he* was a subject of the Grand Jury investigation and had therefore, by his showing before the Court satisfied the burden upon him which the Court in the *Rosen* case described as follows:

"As they (the questions) do not on their face appear to call for answers which would tend to incriminate the appellant, it was incumbent upon him to justify his refusal to answer on the ground claimed by making it appear that his assertion that they would was based upon substantial reason so to believe *and was not made merely to protect some other person or persons.* Counselman v. Hitchcock, 142 U. S. 547; Brown v. Walker, 161 U. S. 591; Mason v. United States, 244 U. S. 362; United States v. Zwillman, 2 Cir., 108 F. 2d 802; United States v. Weisman, 2 Cir., 111 F. 2d 260; United States v. Cusson, 2 Cir., 132 F. 2d 413." (Emphasis added.) *United States v. Rosen, supra,* at pages 1232-1233.

F. The Cases at Bar.

As indicated above under II, A and B, the so-called "appellants' showing" does not in any way connect these appellants with any of the facts they offered to prove. The appellants have made no showing that *they* are involved. They have made no showing that there exists a threat of prosecution under the Smith Act or under any Federal Statute as to them. The *Zwillman, Weisman, Cusson, Counselman and Rosen* cases, *supra,* cited by appellants as supporting their position, all involve witnesses who showed that the peril was tangible, real, appreciable or pressing as to the witness *himself* and in fact that prosecution of the witness was likely to develop out of the activities of the very Grand Jury before which the questions were propounded.

These appellants have done nothing to connect themselves with a likelihood of prosecution under indictment by this Grand Jury or by any other. The Court below was satisfied that there existed no peril to these appellants in answering the questions. The Court below was satis-

fied that the appellants had failed to show a "reasonable probability that their answers would show or tend to show a violation of any law of the United States." See *Miller v. United States,* 9 Cir., 95 F. 2d 492, at 494.

In all cases where the questions have no *direct* tendency to incriminate there is an affirmative burden on the witness to make a showing to the Court that incrimination will probably result from answering. In cases where the witness contends that documents which he is ordered to produce will incriminate him he is required to submit the documents to the Court and show wherein they incriminate. See:

Correttjer v. Draughon, 1st Cir., 88 F. 2d 116;
Brown v. United States, 276 U. S. 134;
United States v. White, 322 U. S. 694.

In the case at bar the witnesses were afforded the opportunity of making their showing by private statement to the Court in chambers. They disclosed nothing in such statements. They not only failed to make a showing of indirect tendency to incriminate, they were unable to do so.

The Court, which afforded the witnesses their opportunities to show the existence of incriminatory peril was satisfied that none existed. Its determination is supported by the evidence and as was stated by the Court of Appeals in the *Mason* case, 244 U. S. 362, at page 366:

> "Ordinarily, he (the court) is in much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere."

IV.

No Basis Exists for a Claim of Privilege Against Self-Incrimination for Conspiracy to Obstruct the Administration of Justice.

The assertion of a privilege against self-incrimination for conspiracy to obstruct the administration of justice was not made by the appellants below, but was and is merely an argument of counsel, conceived after the witnesses had refused to testify, and not even present in the minds of the witnesses at the time of their refusals. No such claim was made by any witness in his private statement to the Court, despite the notably meticulous and uniform language of each witness in referring to fear of prosecution under the Smith Act [Doran, R. 380-383; Bock, R. 396-400; Kasinowitz, R. 435-436; Steinberg, R. 441-442; Dobbs, R. 427-429].

The novel and ingenious nature of such an argument, and yet its falsity, appears from the fact that witnesses to be called for any and all Grand Jury inquiries could by such a scheme entirely defeat the purposes of the constitutionally created body known as the Grand Jury, but only by placing upon the Constitution a construction such as Chief Justice Marshall had in mind when he stated in *Gibbons v. Ogden,* 22 U. S. 1 at p. 220:

> "Powerful and ingenious minds * * * may, by a course of well-digested, but refined and metaphysical reasoning * * * explain away the Constitution of our country and leave it, a magnificent structure, indeed, to look at, but totally unfit for use."

V.

The Questions Propounded Did Not Compel Disclosure by Appellants of Political Opinion or Association Nor Did They Violate Any Rights of Appellants Under the First Amendment to the Constitution of the United States.

It is apparent from reading the Record that the Grand Jury was disinterested in the political affiliation of the appellants. The questions pertained to appellants' knowledge of matters which were preliminary to ascertainment of facts concerning Federal employees who were the subject of the Grand Jury inquiry. The extent that the questions may have touched upon the matter of a political party was entirely incidental.

The First Amendment to the Constitution of the United States grants the freedoms of religion, speech and the press, and cloaks an individual with the protection necessary to preserve those principles.

However, even if the questions had called for a disclosure of political affiliation, it is a matter of common knowledge that political affiliation is not a matter of secret. Also it is a matter of common knowledge that a requisite to the casting of a vote at a primary election carries with it the necessity of declaring a person's party affiliation by registration with the proper authorities. This is illustrated by the Court in *Barsky v. United States,* 167 F. 2d 241, a case decided by the Court of Appeals for the District of Columbia where it is stated at page 249:

> "* * * The right of a qualified citizen to vote as he pleases is certainly a fundamental right and is a

basic concept in our system of government. Public voting subjected even the most hardy to pressure and also to violence. But it was never thought, or suggested, that public voting violated constitutional rights. The secret ballot does not seem to have appeared in this country until February 1888, when the newly-devised Australian system was adopted for municipal elections in Louisville, Kentucky. On this subject see Wigmore's Australian Ballot System (cf. 8 Wigmore, Evidence (3d ed. 1940), Sec. 2214, p. 163)."

Even a direct question, which was not here involved, whether one is a member of the Communist Party would be no more an infringement of an individual's right under the First Amendment of the Constitution of the United States than an inquiry of whether or not the person is a member of the Democratic, Republican or Socialist Party. Were it not possible to ascertain an individual's political affiliation, the ability to investigate election frauds would be, not only curtailed, but made practically impossible.

People have the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect to their personal and private affairs. The question in each case, therefore, must be whether the inquiries are arbitrary or unreasonable. The right to remain silent does not apply where essential operations of Government may require disclosures "for the preservation of an orderly society—as in the case of compulsion to give evidence in court" *West Virginia Board of Education v. Barnette,* 319 U. S. 624, 645.

Our courts have etsablished that it is not a violation of an individual's constitutional rights to be asked to reveal his connection with a particular party.

In *Abrams v. United States,* 2 Cir., 64 F. 2d 22, a Democrat was tried in contempt proceedings because of his refusal before a Federal grand jury to disclose his connections with the Democratic Party. In this case, at page 23, it is stated:

> "The appellant was subpoenaed to appear as a witness before a federal grand jury in the Southern district of New York in the course of its investigation of alleged election frauds in violation of 18 U. S. C. §51 (18 U. S. C. A. §51). He appeared, and, while being examined, was asked certain questions which he refused to answer on the ground that his answers might tend to incriminate him. He was then taken before a District Judge; a hearing was had at which he was represented by counsel; he was directed to answer certain of the questions, and given an opportunity to appear again before the grand jury to do so. Upon his refusal to do so, he was adjudged in contempt and sentenced to a term of imprisonment with the privilege of purging himself within five days by answering as directed.
>
> The appellant, when he appeared before the grand jury, gave his name and residence. The following then occurred:
>
> 'Q. Live anywhere else? A. Yes, sir.
>
> Q. Where? A. I do not think I will answer that.
>
> Q. Well, if you have in mind a possible prosecution for registering from the wrong address, I can assure you now that we have not any such thing in mind. In any event, we have no jurisdiction of it. Registering from the wrong address is not a Federal

crime, and therefore is no immunity against answering that question. A. Well, I still refuse to answer.'

After testifying as to his occupation, the examination continued:

'Q. Are you the Democratic captain of the Fourth Election District of the Fourth Assembly District in New York County? A. I do not think I will answer that.

Q. On what ground do you decline to answer that? A. Well, standing on my constitutional rights. It may tend to incriminate me.

Q. Where was the polling place of the Fourth Election District of the Fourth Assembly District at the last election? A. I refuse to answer that.

Q. On what ground? A. Same grounds.

Q. You mean that it might tend to incriminate you? A. Yes.

Q. Were you present at the polling place? A. I refuse to answer.'"

The witness was found guilty of contempt which was affirmed on appeal, the Court stating, at page 29:

"It was surely not a violation of law either to be or not to be the Democratic caption of the election district concerning which inquiry was made; nor to know, or not to know, the location at the then last election of the polling place in that district; nor to have been, or not to have been, present at that polling place at the then last election; nor to have been, or not to have been acquainted with the persons who acted as inspectors in that district at the then last election; nor to have made, or not to have made, to a district leader a report of the result of the vote then

and there cast; nor to have been present, or not to have been present, at any other polling place on that day. * * *" See also *Blair v. United States,* 250 U. S. 273 and *Correttjer v. Draughon,* 1 Cir. 88 F. 2d 116.

In the case of *Barsky v. United States, supra,* which is cited and discussed in our brief in the *Alexander* case (p. 23 ff) the Court states at page 244:

> *"We think that even if the inquiry here had been such as to elicit the answer that the witness was a believer in Communism or a member of the Communist Party, Congress had power to make the inquiry."* (Italics supplied.)

To limit the function of the Grand Jury as urged by appellants in this matter would not be a protection of the private rights but would destroy the private rights because of the inability of society to protect itself. In the *Barsky* case at page 249, the Court said:

> "* * * That the protection of private rights upon occasion involves an invasion of these rights is in theory a paradox but, in the world as it happens to be, is a realistic problem requiring a practical answer. That invasion should never occur except upon necessity, but unless democratic government (by which we mean government premised upon individual human rights) can protect itself by means commensurate with danger, it is doomed. That it cannot do so is the hope of its opponents, the query of its skeptics, the fear of its supporters. * * *."

VI.

The Appellants Have No Standing to Challenge the Composition and Selection of the Grand Jury.

We deem no answer necessary to appellants' contention that the Court below erred in refusing to take evidence challenging the composition of the Grand Jury, other than to cite the case of *Blair v. United States,* 250 U. S. 273, in which witnesses before a Grand Jury were found in contempt of court for refusal to answer questions pertaining to political activity despite their contention that the Grand Jury was without constitutional authority to conduct the inquiry.

Upon writ of error the Supreme Court affirmed, stating at page 282:

> "He (the witness) is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his. Nelson v. United States, 201 U. S. 92, 115.
>
> "On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization.
>
> "He is not entitled to set limits to the investigation that the grand jury may conduct. The Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being possessed of the same powers that pertained to its British prototype, and in our system examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual. Hale v. Henkel, 201 U. S. 43, 65. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by ques-

tions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. Hendricks v. United States, 223 U. S. 178, 184."

VII.

The Interests of Justice and the Maintenance of an Orderly Society Require Affirmance of the Judgments and Orders.

There is necessarily presented in this case the problem of weighing the conflicting interests on the one hand of society as a whole, and on the other of the individual. The problem is inherent in cases of this sort. In the case of *Barsky v. United States,* 167 F. 2d 241, in which the Court of Appeals for the District of Columbia affirmed a conviction for wilful failure to produce records before a committee of Congress (the refusal being on the ground that disclosure of membership in the Communist Party might result), the Court stated at page 244:

> "The problem thus presented is difficult and delicate. In it we have not only the frequent *'real problem of balancing the public interest against private security,'* but in this instance we must do so in the midst of swirling currents of public emotion in both directions."

Further, in the same case, at page 249, as we have previously in this brief quoted, the Court states:

> "* * * That the protection of private rights upon occasion involves an invasion of those rights is

in theory a paradox but, in the world as it happens to be, is a realistic problem requiring a practical answer."

In the case at bar the public interest is represented by the grand jury, which finds its creation in the Fifth Amendment to the Constitution of the United States, the same Amendment which provides for those other bulwarks of civil liberties, prohibitions against double jeopardy and compulsory testimony against onself in a criminal case as well as the guarantee of due process of law. The grand jury is an institution designed to protect the *individual.*

> "It has been said that, since there is no danger to the citizen from the oppressions of a monarch, or of any form of executive power, there is no longer need of a grand jury. But whatever force may be given to this argument, it remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice Shaw in the case of Jones v. Robbins, 8 Gray, 329, 'individual citizens' 'from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury;' and 'in case of high offenses' it 'is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions.' "
>
> *Ex parte Bain,* 121 U. S. 1 at p. 12.

If the grand jury is to continue to function for the protection of the individual it must be able to function effectively. Its effectiveness depends almost entirely upon its ability, through the processes of the court to compel

attendance and testimony before it. These appellants, while paying lip service to the maintenance of civil liberties, contend for a rule which would enable a witness before a grand jury to decide for himself whether to testify, thus in effect destroying the institution of the grand jury.

That it may be inconvenient or even distasteful to be under subpoena and required to testify cannot be denied. But such is the price, in small part, which must be paid by the citizens of an orderly society. Indeed, being subject to the contempt power of the court is also part of that price, as was said by the Court in *Doyle v. London Guarantee Co.*, 204 U. S. 599, at page 607:

> *"But the power to punish for contempt is inherent in the authority of courts, and is necessary to the administration of justice and part of the inconvenience to which a citizen is subject in a community governed by law regulated by orderly judicial procedure."* (Emphasis supplied.)

Particularly should the champion of civil liberties be aware of the necessity of maintaining the instrumentalities of an organized society, including the grand jury, for without the effective machinery of government such liberties are idle concepts and meaningless prattle:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. * * *"
>
> *Cox v. New Hampshire,* 312 U. S. 569, at page 574.

In the case at bar there must be considered the necessity of maintaining the grand jury as an effective instrumentality of Government. In this case the grand jury is attempting to accomplish its high constitutional purposes. It is being obstructed by the appellants, who contend that their constitutional rights are being violated by a prosecutor guilty of "hypocrisy" and "tyranny." The Government contends, on the contrary, that the Constitution is being upheld and protected against witnesses who are perverting a constitutional privilege and are remiss in their refusal to accept the responsibilities of citizenship:

> *"Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege."* (Emphasis added.) *Brown v. Walker,* 161 U. S. 591, at page 600.

There is presented in this case not so much the necessity of balancing conflicting interests, but rather of evaluating each so that each may be revealed in its true light. The spurious assertion of a constitutional privilege is an interest which needs no protection.

> "Invocation of constitutional liberties as part of the strategy for overthrowing them presents a dilemna to a free people which may not be soluble by constitutional logic alone."
>
> *Terminiello v. Chicago,* Supreme Court of the United States, Case No. 272—October Term, 1948, decided May 16, 1949, Jackson, J., dissenting, at page 24.

Conclusion.

Reference is made again to the Government's brief filed in the *Alexander* case. At the outset of this brief it was stated that the *Alexander* case brief was adopted herein in support of the Government's position. We submit that entire brief upon the questions of law here involved and as setting forth the law applicable and controlling on the issues herein presented. The Conclusion therein presented applies here and is adopted. We disregard the charges, among others, of hypocrisy and tyranny made by the appellants against Government counsel. We deem the record clear to the effect that these appellants are mere witnesses called for the sole purpose of giving evidence as to others. We submit that they are entitled to the same privileges and are subject to the same obligations as any other witness and to no others. They cannot by the spurious assertion of a privilege be permitted to protect others and thereby defeat the functioning of the grand jury.

The Judgments and Orders as to all appellants in both cases should be affirmed.

Respectfully submitted,

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